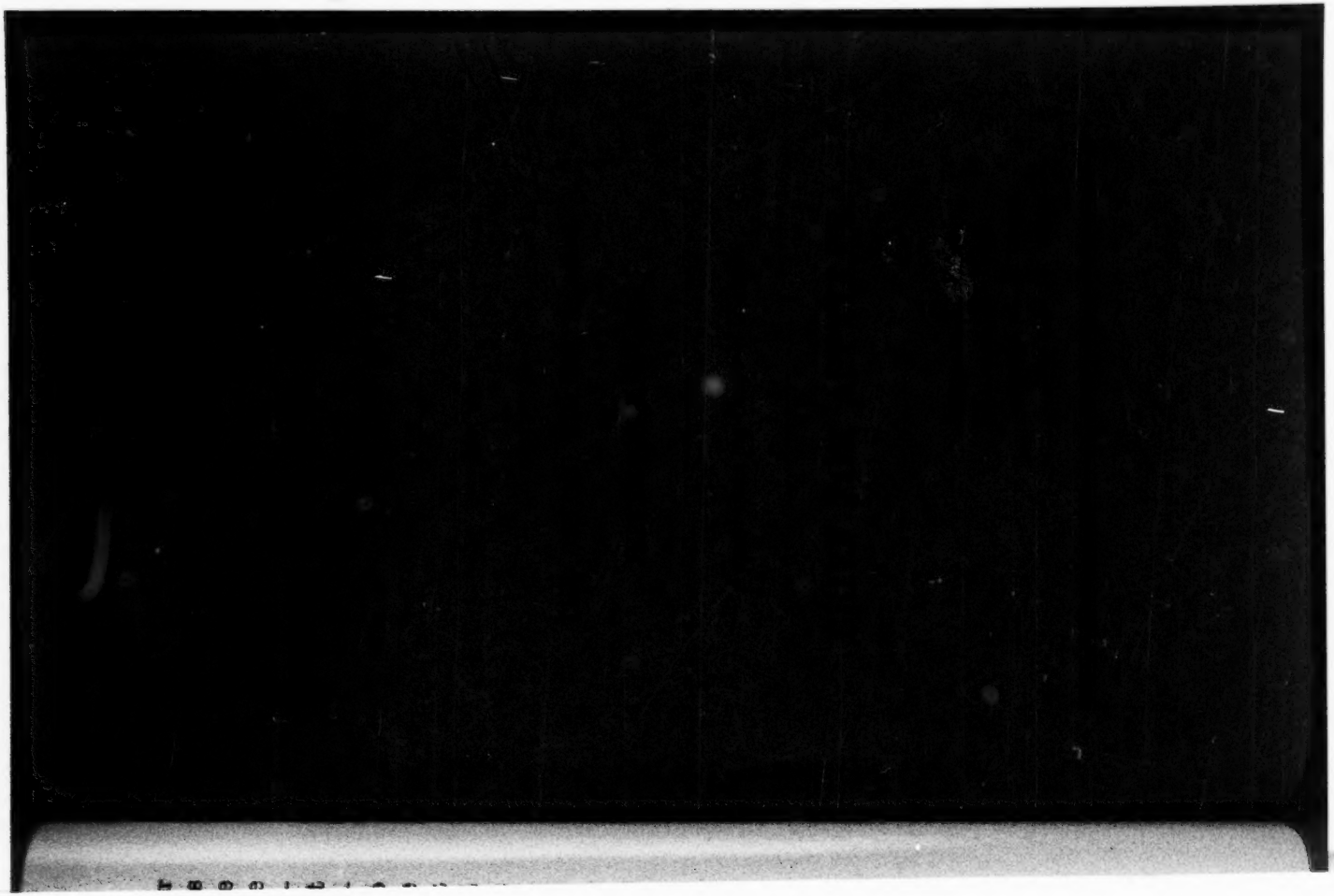

TABLE OF CONTENTS.

TABLE OF CASES.

Supreme Court of the United States.

October Term, 1924.

THE UNITED STATES,
Appellant,
v.
JEFFERSON F. MOSER. } No. 99.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

The facts are stated in the findings of fact and opinion of the Court of Claims (record, pp. 5–7). The claim is for the pay of a rear admiral less that of captain already received. The Court of Claims decided in favor of the claimant and the United States appealed.

The claim is based upon the Navy Personnel Act of March 3, 1899, Sec. 11 (Chap. 413, 30 Stat. 1004, 1007):

"That any officer of the Navy, with a creditable record, who served during the Civil War, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade."

This is the *fourth* suit of this claimant for successive installments of salary.

The history of these suits is as follows:

1. September 29, 1904, to December 31, 1906, judg-

ment entered February 4, 1907; opinion by Chief Justice Peelle, 42 C. Cls. 86. Printed as Appendix "A" to this brief (*post*, pp. 19–27). No appeal. Judgment paid.

2. January 1, 1907, to February 9, 1914, judgment entered February 9, 1914, opinion by Judge Barney, 49 C. Cls. 285. Printed as Appendix "B" to this brief (*post*, pp. 27–33). An appeal was taken from this judgment and the case docketed and the record in this court printed. Its disposition was as follows (239 U. S. 658):

"No. 159. The United States, Appellant, *v.* Jefferson F. Moser. Appeal from the Court of Claims. December 17, 1915. Dismissed on motion of Mr. Solicitor General Davis for the appellant. The Attorney General and The Solicitor General for the appellant. Mr. George A. King and Mr. William B. King for the appellee."

3. February 10, 1914, to December 11, 1917, judgment entered June 3, 1918 (53 C. Cls. 639). No appeal. Judgment paid. (Findings of fact, conclusion of law and memorandum opinion set out as exhibit to petition in this record, p. 4, top p. 5.)

4. January 1, 1918, to March 15, 1923, judgment entered March 19, 1923. Opinion by Judge Hay (record, pp. 6, 7; 58 C. Cls. 164). From this last judgment an appeal was duly taken and is the case now before the court.

II. BRIEF OF ARGUMENT.

Former Judgments Conclusive.

Three previous suits for successive installments of

salary all based upon the same grounds of fact and law settle this question as conclusively as judgments of courts can settle any human transactions.

It is contended that the Government may again litigate the question because the period involved is different from that involved in preceding cases. The issue litigated was the same in the first case and in all the later ones, that is, whether the pay properly due Moser from the date of his retirement, September 29, 1904, was that of a rear admiral or merely that of a captain. If his proper rate of pay was that of a rear admiral from September 29, 1904, it is and will continue to be the same as long as he lives. The act of August 5, 1882, chap. 391, 22 Stat. 284, 286) provides:

"Hereafter there shall be no promotion or increase of pay in the retired list of the Navy but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired."

The adjudication of the Court of Claims, therefore, that Moser was entitled to draw the pay of a rear admiral from September 29, 1904, until December 31, 1906, was conclusive in favor of his right to draw that rate of pay not only during that period but for the rest of his life.

The decisions of this court to that effect are so numerous and positive that it is unnecessary to go outside of them to establish the proposition. Some of them are cited in the opinion of Judge Barney in the second *Moser* case, 49 C. Cls. 285 (*post*, pp. 29–32).

In *United States* v. *O'Grady*, 22 Wall. 641, 647, 648, it is said:

"It is clear that the judgments of this court, rendered

on appeal from the Court of Claims, if no such power is conferred by an act of Congress, are beyond all doubt the final determination of the matter in controversy; and it is equally certain that the judgments of the Court of Claims, where no appeal is taken to this court, are, under existing laws, absolutely conclusive of the rights of the parties, unless a new trial is granted by that court as provided in the before-mentioned act of Congress. * * *

"Should it be suggested that the judgment in question was rendered in the Court of Claims, the answer to the suggestion is that the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under existing laws as the judgment of the Supreme Court, until it is set aside on a motion for new trial."

In *Bissell* v. *Spring Valley Township*, 124 U. S. 225, an action on coupons attached to bonds of a municipal corporation, this court held its decision against the validity of the coupons of earlier date in a previous case between the same parties (110 U. S. 162) to be conclusive.

The principle applies equally where a decision was made by the Court of Clams, especially so, where the United States as defendant had the legal right to take an appeal to this court and either failed to exercise that right as in the first and third cases of Moser, or having taken an appeal to this court dismissed it before final determination, as in the second suit.

In *Southern Pacific Railroad Co.* v. *United States*, 168 U. S. 1, the court said, pp. 48, 49:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different

cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined by them."

In *Hubbell* v. *United States*, 171 U. S. 203, 207–209, a patentee brought suit in the Court of Claims for compensation for use of his patent. The court dismissed his petition. No appeal was taken. He later sued for compensation for subsequent use. The petition was again dismissed, and this time he appealed to this court.

It was held (pp. 207, 208, 209):

"As the prior action was between the same parties, and was based in part, at least, and principally, upon the same patent, it would appear that the judgment of the court dismissing the petition would operate as a complete estoppel to the present suit, unless the proceedings subsequent to the judgment in the former suit in some way deprived that judgment of its force and effect as *res adjudicata*."

* * *

"Whether the reasons given by the Court of Claims for the dismissal of this petition are correct or not: whether, indeed, this judgment were right or wrong upon the facts presented, is of no importance here. If such judgment were based upon an erroneous view of

the claimant's patent, it was his duty to have promptly taken an appeal to this court, where the whole case would have been reopened and the error of the Court of Claims, if such there was, would have been rectified."

* * *

"But even if a somewhat different theory or state of facts were developed upon the trial of the second case, the former judgment would not operate the less as an estoppel, since the patentee cannot bring suit against an infringer upon a certain state of facts, and after a dismissal of his action, bring another suit against the same party upon the same state of facts, and recover upon a different theory. The judgment in the first action is a complete estoppel in favor of the successful party in a subsequent action upon the same state of facts."

In *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, the question was of the exemption of a railway company from certain taxes. The railway company had in a prior suit obtained an injunction restraining the officers of the State from collecting the taxes for a certain year. In a subsequent year the successors of the same officers proceeded to attempt to collect taxes accruing for several years subsequent to those covered by the injunction in the first suit. The company applied for an injunction to restrain the officers of the State from proceeding to collect these subsequent taxes. In that case, just as here, it was contended that new grounds could be brought forward which would induce a different result for the new period. The following remarks of the court, p. 290, on this subject by Mr. Justice White, later Chief Justice, are very pertinent:

"That the issue in the case was the existence of a charter exemption from taxation in favor of the Cheraw and Darlington Railroad Company, and the consequent want of power of the State to tax the property of the railroad during the continuance of the

exemption, is obvious. And that the decree rendered in the cause established the exemption embraced in the issues is also obvious. This being true, it unquestionably follows that the decree established as to the parties and their privies the very question in issue in this proceeding."

But it is said that the court in its original judgment of February 4, 1907, sustaining the claim and giving judgment for salary for the period September 29, 1904, to December 31, 1906, was ignorant of the existence of a statute, to wit, the act of June 29, 1906 (Chap. 3590, 34 Stat. 553).

This argument may be answered in the language of this court in *Fayerweather* v. *Ritch*, 195 U. S. 276, 307:

"A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed and never ought to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision."

Whatever may be true as to the state of mind of the judges as to knowledge or ignorance of this act of 1906 when their original judgment of February 4, 1907, was rendered, no such ignorance can be imputed to them when rendering the judgment in the second case, February 9, 1914 (49 C. Cls. 285, *post*, p. 27); for the act of June 29, 1906, is referred to in that decision (49 C. Cls. 290, *post*, pp. 28, 29). A second decision and abandonment by the Government of its appeal therefrom is conclusive against any argument based upon supposed ignorance of statute law on the part of the judges in deciding the first *Moser* case.

The same is true of the third case from which there was no appeal.

The question involved in this case therefore being the same as that decided in the original case (42 C. Cls. 86) from which no appeal was taken is conclusive and bars the Government from further contesting any claim of the officer whose rights are here involved based upon his right to the rank and pay of a rear admiral from the date of his retirement, September 29, 1904.

Entitled to Pay as Rear Admiral.

If, however, this court concludes to go behind the repeated judgments of the Court of Claims, the judgment is correct on the merits.

This officer entered the Naval Academy September 29, 1864. He was retired September 29, 1904, by virtue of the following provision of the Revised Statutes, Section 1443:

"When any officer of the Navy has been forty years in the service of the United States he may be retired from active service by the President upon his own application."

As his retirement took place on the fortieth anniversary of his entrance into the Academy, the forty years necessary for retirement had to include the Academy service. It is in accordance with the statute in existence at the time of Moser's entrance into the Academy and with the construction which this court has placed upon that very statute.

The law in force at the time Moser entered the Naval Academy was the act of July 16, 1862 (Chap. 183, 12 Stat. 583). Section 1 of this act provides:

"That the active list of line officers of the United States Navy shall be divided into nine grades, taking

rank according to the date of their commissions in each grade, as follows, viz:

First.	Rear Admirals.
Second.	Commodores.
Third.	Captains.
Fourth.	Commanders.
Fifth.	Lieutenant Commanders.
Sixth.	Lieutenants.
Seventh.	Masters.
Eighth.	Ensigns.
Ninth.	Midshipmen."

Section 11 (p. 585) provides:

"That the students at the Naval Academy shall be styled midshipmen until their final graduating examination, when, if successful, they shall be commissioned ensigns, ranking according to merits."

Section 15 (p. 586), provides:

"That from and after the passage of this act the annual pay of the several ranks and grades of officers of the Navy on the active list, hereinafter named, shall be as follows:

* * * * * * * * *

"Midshipmen shall receive $500."

Construing this act this court held in *United States* v. *Baker*, 125 U. S. 646, that a midshipman at the Naval Academy was not merely in the Navy but was an officer in the Navy.

The court also held that any change made by subsequent law had no application to students already in the Academy. The court said at the conclusion of the opinion (125 U. S. 650):

"No legislation which took place after the 14th of July, 1872, can affect the question arising under the

act of 1883, as to his service as an officer in the navy prior to the 14th of July, 1872. Section 15 of the act of 1862 provided that the 'annual pay of the several ranks and grades of officers of the navy on the active list,' thereinafter named, comprehending the nine grades mentioned in the first section of the same act, should be as thereinafter specified in the 15th section, and the last provision was this: 'Midshipmen shall receive $500.'

"It is impossible not to conclude that the claimant continued to be, after the passage of the act of 1870, as he was prior to its passage, an officer of the navy, on the active list, and serving as such an officer, by virtue of his having been appointed a midshipman and continuing to be a student in the naval academy, even though he might have been properly styled after the passage of the act of 1870, a cadet midshipman."

In *United States* v. *Cook*, 128 U. S. 254, reaffirmed the *Baker* case (p. 256):

"That a midshipman is an officer has been understood ever since there was a navy. He is not one of the common seaman. His name indicates a middle position, between that of a superior officer and that of the common seaman. Harris, in the early part of last century, and Johnson in the middle of it, defined 'midshipmen' as 'officers aboard a ship.'"

Moser was included within the description "who served during the civil war." The civil war was flagrant on September 29, 1864, and so continued for a long time thereafter. As to how long it continued see *United States* v. *Anderson*, 9 Wall. 56, 71; *The Protector*, 12 Wall. 700.

Provision for Higher Grade Self-Executing.

The provision of Sec. 11 of the Navy Personnel Act of March 3, 1899 (*ante*, p. 7), was self-executing. It

required no action by any board or officer to give Moser a higher rank on the retired list. It says that any officer having the requisite qualifications "*shall*, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade." Rank is given an officer on the retired list not as a new office but for purposes of honor and pay.

The law in force at the date of this officer's retirement did not provide for any commission to be issued to the officer thus retired in the next higher grade. None was given Moser (Finding V, original *Moser* case, 42 C. Cls. 88, *post*, p. 20).

In *Wood* v. *United States*, 107 U. S. 414, this court considered the rank of an Army officer on the retired list (pp. 416, 417):

"The Court of Claims dismissed the petition on the merits. The view of that court was that, under the statutes of the United States in reference to the army, the office of an officer of the army and his rank are not necessarily identical; that the office has a rank attached to it, expressed by its title, when no other rank is conferred on the officer; that the office remaining the same, the officer may have a different rank conferred on him, as a title of distinction, to fix his relative position with reference to other officers as to privilege, precedence, or command, or to determine his pay; that, by section 1274 of the Revised Statutes, the pay of officers on the retired list of the army is determined by the rank upon which they are retired; that, by section 1094, the officers of the army on the retired list are a part of the army of the United States, and therefore, no one can be upon that list who is not an officer appointed in the manner required by section 2 of Art. 2 of the Constitution; that an officer of any grade, on the active list, thus appointed, may be retired with a different rank from that which belongs to his office, when Congress so provides; that this is not to appoint him to a new and different office, but is to transfer him to the retired list,

and to change his rank, while he holds the same office; and that in connection with this change of rank his pay may be changed. These views appear to us to be sound."

The opinion concludes (foot p. 417): "The pay of retired officers is a matter entirely within the control of Congress, and so is their rank."

The only difference between the *Wood* case and this is that there the officer's rank, and in consequence his pay, were *reduced* by a general provision of law, while in the case at bar they were *raised.*

The present act is of the same character as the statute of New York for the retirement of policemen. That act was construed by the Court of Appeals of New York as self-executing. That court said in *Fitzpatrick* v. *Greene,* 181 N. Y. 308, 309, 310:

"By section 355 of the present charter of the city of New York an honorably discharged soldier or sailor from the Army or Navy of the United States in the late civil war 'who has performed duty on said police force for a period of twenty years or upwards, upon his own application in writing, * * * providing there are no charges against him pending, *must* be relieved and dismissed from said force and service by the department and placed on the rolls of the police pension fund and awarded and granted, to be paid from said pension fund, an annual pension during his lifetime of a sum not less than one-half of the full salary or compensation of such member so retired.'

"It will be seen that this statute permits a member of the police force to retire from the service, providing he is a veteran and has served twenty years. That the relator was such a veteran and had served twenty years is admitted in the return to the writ of *certiorari,* and conceded upon the arguments. It will be seen also, that this statute executed itself, in the sense that when the necessary facts exist the retirement is accomplished

by the policeman's application in writing. In other words, when the necessary conditions actually exist the retirement is accomplished by the policeman's application without any action upon the part of any other body."

Effect of Act June 29, 1906.

But it is claimed on behalf of the Government that Moser's right to the higher rank on his retirement September 29, 1904, was taken away by the act of June 29, 1906 (Chap. 3590, 34 Stat. 553, 554) (record, p. 7; brief for United States, pp. 6, 7).

If his retirement in 1904 gave him without any act on the part of the executive officers of the United States the higher rank and pay of a rear admiral, certainly there was no intent in the passage of the act of June 29, 1906, to take it away from him.

The words of past tense in the act of 1906 were intended to reach an altogether different class of cases. The provisions of the 11th section of the personnel act of 1899 conferred no benefit upon any officer of the Navy retired before its passage. They looked entirely to future retirements. Before the passage of that act, however, large numbers of officers with civil war service had already been retired. Indeed, there were cases where officers who had served in two wars, the civil war and the war of 1898 with Spain, had been retired before March 3, 1899, and received no benefit of that act.

This condition was felt to be a hardship and an injustice.

Reference to any officer of the Navy "who has heretofore been retired," etc., was intended to advance on the retired list those who had been retired before 1899. In the report of the Senate Committee on this very

bill (Senate Report 3921, 59th Congress, 1st Session, p. 5) in a letter from the Navy Department on this subject appears the heading, "Retired Officers (Those Retired Prior to Personnel Act)."

As the court below points out in its opinion (Record, two-thirds down p. 7) there is a proviso to the act of 1906:

"That this act shall not apply to any officer who received an advance in grade at or since the date of his retirement," etc.

The advance in grade under Section 11 of the act of 1899 was the only advance existing at that date to which this proviso could possibly apply. A retirement accompanied by an advance in grade under the act of 1899, as in this case, was thus the very right that was saved by the proviso of the act of 1906.

Retroactive Construction not Favored.

A statute should never be construed as retroactive wherever its terms can be satisfied by giving it a prospective construction.

The language of past tense in the statute can be fully satisfied by giving the benefit of the act to those who had previously been retired without getting an advance in grade. It did not take away from those already retired the higher grade already attained by them upon retirement.

In the *Twenty Per Cent Cases*, 20 Wall. 179, 187, 188, this court said:

"Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or

with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms.

"Such a law, if passed by a State, and construed to have the effect claimed for it in this case by the appellants, would be unconstitutional and void; but it is not necessary to discuss any such proposition in this case, as there is not a word in the repealing act to support the conclusion that Congress intended to rescind any antecedent contract, or to enact any bar to the right of recovery in such cases where the service had been faithfully performed before the repealing act was passed."

In *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131, the court said (p. 134):

"After the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law then gives for its enforcement."

In *White* v. *United States*, 191 U. S. 545, this court construed a provision of the Personnel Act of 1899, "that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall on the date of appointment be credited for computing their pay with five years' service."

It was held that that act did not operate to grant

any additional pay for past services, but that the terms of past tense could be fully satisfied by giving the increased pay in the future wherever such would be the effect of giving a credit of five years on the date of an appointment made before as well as after the passage of the act.

Effect of Act March 3, 1909.

But there is a still later act which sets at rest all question as to the intent of Congress. Act of March 3, 1909 (Chap. 255, 35 Stat. 753):

"The provisions of the Act approved June 29, 1906, entitled 'An Act making appropriations for the naval service for the fiscal year ending June 30, 1907, and for other purposes,' providing for the retirement in the next higher grade of officers of the navy who served during the civil war, shall not operate to deprive any officer of the navy who has been, or may be, retired, since the passage of that Act, of the right to increased rank and pay to which, but for the passage of said Act, he would have been entitled."

Judge Barney in giving the opinion of the Court of Claims in the second *Moser* case, said (49 C. Cls. p. 294 (*post*, p. 33):

"It is argued that it was the evident intention of Congress by the latter act to take away all retroactive effect which might otherwise be given to the act of June 29, 1906 (34 Stat. 554), and that any other construction would lead to the absurdity of making the act of 1906 take away the right of any officer who retired before its passage, but relieving from its operation those who have retired since. And numerous authorities from the Supreme Court are cited to the proposition that a statute should not be given a retrospective effect unless the words used are so clear and imperative as to admit of no other construction. This point is not con-

sidered or decided, as the first point decided disposes of the case in favor of the claimant."

The intent of the passage of the act of 1909 is clear. It is to prevent the act of 1906 having any such retroactive effect as to prejudice the right that any officer of the Navy would otherwise have to the next higher grade upon retirement.

True, it provides that the act of 1906 "shall not operate to deprive any officer who has been, or may be, retired *since* the passage of that act of the right to increased rank and pay to which, but for the passage of said act, he would have been entitled."

It does not in terms say that officers retired *before* the passage of the act of 1906 shall not be deprived by that act of the right to increased rank and pay. Surely, however, if the act of 1906 was not to take away a right from any officer *thereafter* retired, it did not take away such right from those who had *theretofore* been retired.

An act declaratory of the construction of a previous act which says that the previous one shall not prejudice rights accruing after its passage implies *a fortiori* that the act can not prejudice rights accruing *before* the previous act was passed. Thus the construction placed in 1909 by Congress upon its own previous legislation of 1906 demonstrates that there was no intention to take away from any officer previously retired any of the rights which would be his but for the passage of the act of 1906.

Conclusion.

This controversy has now been going on for twenty years. The government has had three previous oppor-

tunities to correct any possible error made by the court below by appeal to this court. No appeal was taken in the first action, where the original question of the right to this pay could have been settled. An appeal was taken in the second action, where the question of the conclusiveness of the first decision, and perhaps also the effect of the acts of 1906 and 1909, could have been settled. Instead of presenting these questions to this court the government dismissed its appeal. The third suit was decided on the basis of the two previous ones. That, too, passed without appeal. A belated appeal from the fourth judgment seeks to set at naught all that has gone before. The action of the Navy Department in refusing to follow repeated decisions of the Court of Claims is treated in the brief by the United States (foot p. 26) as having some force against his rights. Rather should it be treated as an unwarrantable disregard of judicial action which should have met with ready obedidence. *Smith* v. *Jackson*, 246 U. S. 388.

It is time that this officer in his old age should no longer be required to keep on suing in the Court of Claims, but should have the honors and pay which Congress granted to officers in his situation, and which have been too long withheld.

The judgment of the Court of Claims should be affirmed.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Appellee.

APPENDIX A.

[From 42 C. Cls. 86–94.]

JEFFERSON F. MOSER *v.* THE UNITED STATES.

This case having been heard by the Court of Claims, the court upon the evidence makes the following

FINDINGS OF FACT.

I. The claimant entered the United States naval service as midshipman on September 29, 1864, and has served continuously in the Navy since that date.

II. On August 10, 1903, he was promoted to the grade of captain, and on September 29, 1904, while serving in that grade, he was placed on the retired list after forty years' service in accordance with section 1443 of the Revised Statutes. The letter notifying him of his retirement is as follows:

"NAVY DEPARTMENT,
"*Washington, May 17, 1904.*

"Sir: The President of the United States having approved your application for retirement, you are, by his direction, transferred to the retired list of officers of the Navy from September 29, 1904, in accordance with the provisions of section 1443 of the Revised Statutes of the United States.

Very respectfully,
"CHAS. H. DARLING,
"*Acting Secretary.*

"CAPTAIN JEFFERSON F. MOSER, U. S. NAVY,
"*Commandant Naval Training Station,*
"*San Francisco, Cal.*"

III. During his entire service his record was creditable, as reported by the Secretary of the Navy, about which there is no controversy.

IV. When placed on the retired list, he was not recognized by the Navy Department as entitled to the rank and pay of the next higher grade and has been paid as captain only.

V. When officers of the Navy are retired with increased rank under section 11 of the navy personnel act of March 3, 1899 (30 Stat. L. 1007), no commission in the higher rank in which they are retired is given them, but a letter is written, of which the following is a specimen:

"NAVY DEPARTMENT,
"*Washington*, ——.

"Sir: The President having approved your application for retirement, you have been, by his direction, transferred to the retired list of officers of the Navy from the 11th day of January, 1905, in accordance with the provisions of section 1443 of the Revised Statutes, and with the rank and three-fourths of the sea pay of a rear-admiral, in accordance with the provisions of section 11 of the act of Congress approved March 3, 1899, commonly known as the 'Navy personnel act.'

"Very respectfully,"

VI. Upon the foregoing findings of fact the court finds the ultimate fact, so far as it is a question of fact, that the claimant's service as a midshipman in the Naval Academy from September 29, 1864, to the close of the war of the rebellion was creditable service "during the civil war."

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to recover judgment in the sum of $2,537.50.

Peelle, Ch. J., delivered the opinion of the court.

September 29, 1864, the claimant was appointed a midshipman at the Naval Academy, and served there continuously until after the close of the late civil war. On August 10, 1903, he was promoted to the grade of captain, and on September 29, 1904, he was, at his own request—after forty years' service—placed on the retired list by the President under the provisions of Revised Statutes, section 1443.

Section 11 of the act of March 3, 1899 (30 Stat. L. 1007), known as the "Navy personnel act," provides:

"That any officer of the Navy, with a creditable record, who served during the civil war, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade."

The claimant contends—and that is the whole case—that he was entitled to be "retired with the rank and three-fourths the sea pay of the next higher grade"; that is to say, with the rank and three-fourths the sea pay of a "rear-admiral embraced in the nine lower numbers of that grade," as provided by section 7 of said personnel act.

To entitle the claimant to recover he must show, not only that he was an officer of the Navy with a creditable record, but that his service as a midshipman at the Naval Academy was service "during the civil war," within the meaning of the act.

The evident purpose of that statute was upon retirement to give to those officers of the Navy with creditable records, "who served during the civil war," credit by way of advancement to the rank and three-fourths the sea pay of the next higher grade.

If the claimant were seeking to recover the salary of an office to which he had not been appointed, clearly he could not recover, as the power of appointment to office in the Navy resides in the executive branch of the Government; and while the office carries with it the rank and salary pertaining to that grade, it does not follow that one may not be entitled to the rank without holding the office; that is to say, the name of the office is also a designation of rank, which latter may be changed by Congress without encroaching upon the executive branch of the Government. This was the ruling of the court in the case of *Wood* (15 C. Cls. 151, 160), where the court, respecting the power of Congress to change the rank of an officer in the Army, said:

"By Revised Statutes, section 1094, officers on the retired list of the Army compose part of the Army of the

United States, and therefore no one can be upon that list who is not an officer appointed as required by the Constitution, article 2, section 2. But being such officer, thus appointed, of any grade on the active list, he may be retired with a rank higher or lower than that which belongs to his office whenever Congress sees fit so to provide. Congress can not appoint him to a new and different office, because the Constitution vests the appointing power in the President with the advice of the Senate, or in certain cases in the President alone, the heads of the Executive Departments, or the courts of law; but Congress may transfer him to the retired list, and may change his rank and pay at any time, without coming in conflict with that provision of the Constitution."

That case was, on appeal to the Supreme Court affirmed (107 U. S. 414). The court, referring to the ruling of this court, said: 'These views appear to us to be sound. General Wood, holding the office of a colonel of cavalry in the Army, his retirement with the rank of major-general, under the act of 1868, did not confer on him the office of major-general. He remained in the office of colonel of cavalry, and acquired a higher rank and higher pay as a retired officer. Such rank not being an office, Congress could change his rank, and with it his pay, as it did by the act of 1875. * * * The pay of retired officers is a matter entirely within the control of Congress, and so is their rank." *Leopold* v. *United States* (18 C. Cls. 546); *Hawkins* v. *United States* (40 C. Cls. 110); *United States* v. *Redgrave* (116 U. S. 474), affirming the judgment of this court (20 C. Cls. 226). See also 22 Op. Atty. Gen. 433.

Those decisions are in harmony with Revised Statutes, section 1558, respecting the pay of officers of the Navy on the retired list. Therein it is in substance provided that upon retirement the pay of all such officers shall be seventy-five per centum of the sea pay, not of the office held by them, but of the "grade or rank which they held, respectively, at the time of their retirement." Officers thus retired remain subject to the rules and articles for the government of the Navy,

as well as to trial by court-martial. (Revised Statutes, section 1457.)

If, therefore, the claimant was entitled to "be retired with the rank and three-fourths the sea pay of the next higher grade," the court may render judgment in his favor without encroaching on the executive branch of the Government.

Was the claimant's service as a midshipman at the Naval Academy such service as entitled him to be retired with the rank and three-fourths the sea pay of the next higher grade?

The claimant was appointed to the Naval Academy September 29, 1864, and forty years thereafter was, on his own application, retired by the President under Revised Statutes, section 1443, which provides:

"When any officer of the Navy has been forty years in the service of the United States he may be retired from active service by the President upon his own application."

The claimant while at the Naval Academy was, therefore, recognized by the executive department of the Government as an "officer of the Navy * * * in the service of the United States," otherwise he would not have had forty years' service to his credit when he retired.

By the act of July 16, 1862 (12 Stat. L. 583) now Revised Statutes, section 1362, dividing the active list of the line officers of the Navy into nine grades, midshipmen were designated ninth. That law was in force when the claimant was appointed at the Naval Academy and continued in force until after the civil war and until the act of July 15, 1870 (16 Stat. L. 321), when the title of midshipman was changed to cadet-midshipman, but such change of title did not affect the character of the service at the Academy, though that is not material here.

In the case of *Baker* (23 C. Cls. 181) the question involved was whether the claimant, while pursuing his studies at the Naval Academy, was an officer or an enlisted man in the Navy, and whether, if an officer, he

was entitled to be credited with such period of study in the calculation of his longevity pay, and the court held that he was, and that case was, on appeal, affirmed (125 U. S. 646). The latter court, among other things, said:

"The single question involved is whether the claimant, while he was a midshipman, was serving as an officer or enlisted man in the Navy, within the meaning of the act of 1883. The contention on the part of the United States is that the claimant, whilst a student at the Naval Academy, did not, in the sense of the act of 1883, serve either as an officer or an enlisted man; and that, in that view, it is immaterial whether as a student he is or is not to be regarded as an officer of the Navy. It is denied by the United States that the entry of a pupil into the Academy is his entry into the naval service, and that the period of his pupilage is actual service within the meaning of the act of 1883; and it is argued that he does not enter into actual service until he is appointed either in the line of the Navy, the Marine Corps, or the Engineer Corps; that as a student he does not serve, but is preparing to serve; that he does not render service to the Government, but is receiving favors from it; that he can only commence service after his graduation, such service depending upon his graduating merit; and that the compensation of $500 a year given to him is not a payment for service rendered, but is a gratuity and an allowance made for him for his support in his preparation for service to be rendered.

"When the claimant was appointed a midshipman in the Navy, on the 30th of September, 1867, the act of July 16, 1862, c. 183 (12 Stat. L. 583), was in force. The first section of that act divides the active list of line officers of the Navy into nine grades, the first of which is 'rear-admirals,' the eighth of which is 'ensigns,' and the ninth of which is 'midshipmen.' The eleventh section of that act provides that the students at the Naval Academy shall be styled midshipmen, until their final graduating examination, when, if successful, they shall be commissioned ensigns, ranking according

to merit. Thus section 1 of that act creates the grade of midshipman as one of the nine grades of the active list of line officers of the Navy, and section 11 declares that the students at the Naval Academy shall be styled midshipmen. * * *

"It is impossible not to conclude that the claimant continued to be, after the passage of the act of 1870, as he was prior to its passage, an officer of the Navy, on the active list, and serving as such an officer, by virtue of his having been appointed a midshipman and continuing to be a student in the Naval Academy, even though he might have been properly styled, after the passage of the act of 1870, a cadet midshipman."

We must, therefore, conclude that the claimant, while serving as an undergraduate in the Naval Academy, as a midshipman, was an officer of the Navy in the service of the United States, and as such was, under the articles for the government of the Navy, subject to court-martial, and was also subject to the orders of his superior officer the same as other officers of the Navy.

In the recent case of *Jasper* (38 C. Cls. 202) the court in substance held that while a midshipman in the Naval Academy was an officer of the Navy while pursuing his studies there, and as such officer was entitled to have such service reckoned in calculating his longevity pay, yet he was not an officer of the Navy "who served during the civil war" within the intent of the navy personnel act allowing him to retire with the rank and pay of the next higher grade. But on claimant's motion therefor a new trial was allowed, on the theory that midshipmen at the Naval Academy were liable to be and were actually called into the service during the civil war. (*Jasper case*, 40 C. Cls. 76.)

Though the claimant was subject to be ordered to active duty on board ship or otherwise during his term in the Naval Academy, it does not appear that he was so ordered or that he performed any service other than that required of him as a student at the academy. That he was not so ordered into active service, was, of course, not his fault.

Shall, then, the failure of his superior officers to order him into active service during that period deprive him of the benefit of the act? If so, then active service *in the civil war* becomes the test of an officer's right to "be retired with the rank and three-fourths the sea pay of the next higher grade." But to so hold we must import into the section language that will harmonize with that construction. That is to say, we must construe the section as though the language were, that any officer of the Navy, with a creditable record, who served *actively* during the civil war, or who had active service during the civil war, shall be entitled to the benefit of the act. To so hold would exclude from the benefit of the act all officers of the Navy who from no fault of their own saw no active service in or during the civil war.

Suppose prior to the civil war an officer of the Navy had been assigned to duty at the American Legation in London, and because of his efficiency there, or for other reasons, he had been kept there during the whole period of the civil war, would it be contended that he, a recognized officer of the Navy, with a creditable record, did not serve "during the civil war" because he had no active service therein? We think not, and since the claimant was an officer of the Navy with a creditable record on "the active list of the line officers of the Navy" during the civil war, by virtue of the act of 1862 (*supra*), we must hold that his service as a midshipman at the Naval Academy from the date of his appointment thereto until the close of the rebellion was service "during the civil war," within the intent and meaning of section 11 of said navy personnel act, and he was therefore entitled to have been retired with the rank and three-fourths the sea pay of the next higher grade, i. e., with the rank and three-fourths the sea pay of a "rear-admiral embraced in the nine lower numbers of that grade," being three-fourths the old Navy sea pay of a rear-admiral as preserved by section 13 of the Navy Personnel Act, as amended June 7, 1900 (31 Stat. L. 697), as decided by this court in *Terry* v. *United States* (39 C. Cls. 353), followed by the Controller in Barclay's

and Foster's cases (11 Controller's Decisions, 347, 645).

The judgment will be suspended until the computation of the amount due, upon the basis of this opinion, has been ascertained by the accounting officers, after which judgment is ordered to be entered.

On February 4, 1907, judgment was entered in favor of the claimant for $2,537.50.

APPENDIX B.

[From 49 C. Cls. 285, 289–294.]

JEFFERSON F. MOSER *v.* THE UNITED STATES.

BARNEY, *Judge*, delivered the opinion of the court:

The claimant is a retired naval officer and brings this suit to recover the difference between the retired pay of a rear admiral of the nine lower numbers, to which he claims he is entitled, and that of a captain, the pay actually allowed him for the period from January 1, 1907, to March 6, 1912.

The claimant was appointed to the Naval Academy September 29, 1864, remained in the naval service, and passed through the several grades to the rank of captain, which he attained August 10, 1903. On September 29, 1904, upon his own application, he was retired in accordance with the provisions of section 1443 of the Revised Statutes, and following this retirement he was paid three-fourths of the sea pay of a captain in the Navy. On September 13, 1905, he brought suit in this court to recover the difference between the retired pay of a rear admiral of the nine lower numbers and the pay thus allowed him, claiming that he should have been retired with the latter rank pursuant to section 11 of the act of March 3, 1899, 30 Stat. 1007, which is as follows:

"That any officer of the Navy with a creditable record, who served during the Civil War, shall, when

retired, be retired with the rank and three-fourths the sea pay of the next higher grade."

In that suit this court held that service as a cadet at the Naval Academy constituted service during the Civil War within the meaning of this statute, and that the claimant should have been retired with the rank and three-fourths of the sea pay of the grade next above that held by him on the date of his retirement, i. e., the rank and pay of a rear admiral of the nine lower numbers. 42 C. Cls. 86. This decision followed the doctrine laid down in the case of *Baker* v. *United States*, 125 U. S. 646. The judgment in the former *Moser case* was entered in this court February 4, 1907, for the sum of $2,537.50, that being the difference between the claimant's retired pay as a rear admiral of the nine lower numbers and the retired pay of a captain which had been allowed him, reckoned from the date of his retirement to December 31, 1906. No appeal was ever taken in that case, and the judgment was paid.

At the time this former *Moser case* was presented to the court neither one of the parties called the attention of the court to the following provision of the act of June 29, 1906, 34 Stat., 554:

"That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the Regular or Volunteer forces during the Civil War prior to April 9, 1865, otherwise than as a cadet, and whose name is borne on the Official Register of the Navy, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service or on account of age or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided*, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the

retired list by virtue of the provisions of a special act of Congress."

In fact the court and the attorneys engaged in that case were at the time ignorant of the existence of that statute.

A little more than a year after the trial of the former *Moser case* the case of *Jasper* v. *United States*, 43 C. Cls., 368, came before this court, in which the same question was involved, and in that case attention was called to the act of June 29, 1906. It was considered and construed and this court decided that it deprived Jasper of the right to reckon service at the Naval Academy during the Civil War as "service during the Civil War" within the meaning of section 11 of the act of March 3, 1899, *supra*. This reversed the ruling of the court in the former *Moser case*, and the court remarked in its opinion that if the provisions of the act of June 29, 1906, had been called to the attention of the court the result would have been the same in both cases.

It will thus be seen that the question is presented to the court in this case whether the decision and judgment in the former *Moser case*, 42 C. Cls. 86, is *res judicata* as to the claimant's status as to pay as a retired naval officer.

The underlying principles upon which the rule of *res judicata* is based are so familiar that it is needless to discuss them. They are well stated by Mr. Justice Day in *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 510, 511:

"When a plea of *res judicata* is interposed, based upon a former judgment between the parties, the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself; was it within the jurisdiction of the court, between the same parties, and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which in its terms embodied a settlement of the rights

of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. In such cases nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were in the judgment of the court before which the estoppel is pleaded insufficient, a new judgment could be rendered because of these divergent views and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony."

We think one of the definitions of the rule of *res judicata* given in *Van Fleet's Former Adjudications* is particularly applicable to this case: "A final judgment on the merits determining any issue of law or fact, after a contest over it, forever sets it at rest, and fixes it as a fact or as the law in any other litigation between the parties." Id., vol. 1, sec. 1.

It is urged, however, by the defendants that this suit is based upon a different claim or demand from the one litigated in the former *Moser case;* that is to say, that the former *Moser case* was a claim for pay for the period from September 30, 1904, to December 31, 1906, while the demand in this case is for pay since December 31, 1906. We think that is too narrow a view of the issue in the former *Moser case.* It was not denied in that case that Moser was entitled to *some* pay during the period involved; in fact he had already been paid for the period at a certain rate. The real question at issue was the rate of pay to which Moser was entitled to receive, not only from September 30, 1904, to December 31, 1906, but as long as he might live. Stated in another way the issue in that case was the status as to pay of the claimant. The facts in the case were undisputed, and this issue was one of law alone.

If we admit that this court was in error in the former

Moser case in the construction of the statute then in force as to the retired pay of officers (and that is, at least, somewhat doubtful), this error as affecting the rule of *res judicata* would not differ from an error as to any rule of the common law. Where the law of a case is settled by adjudication it is settled as to statute law as well as the common law. When a suit has been tried in a court of competent jurisdiction it is a legal presumption amounting to a conclusion that every issue of law involved in it has been tried and decided.

True, as already stated, the attention of the court was not called to the act of June 29, 1906, *supra;* but it sometimes happens in the trial of cases that if the attention of the court had been called to some decisions and authorities as to the common law which had been overlooked the decision would have been different. In other words, the law of a case may sometimes be settled wrong, but where it is once settled it is none the less final. The act of June 29, 1906, was before the court when the *Jasper case* was tried, and it was urged by able counsel that it did not affect the rights of the claimant. This court decided otherwise, and as this court is not infallible, we may have been wrong in the *Jasper case* and right in the former *Moser case.* We could not have been right in both cases, but right or wrong we made the law in those two cases. This circumstance is noted as showing the reason for the rule of *res adjudicata.*

In the case of *Gardner* v. *Buckbee,* 3 Cowen, 120, where A sued B upon a promissory note, and B pleaded the general issue with notice that the note was given upon the fraudulent sale of a vessel by A to B, which was the question upon the trial, and the verdict was for the defendant, and afterwards A sued B upon another note given upon the same purchase, it was held that upon the trial of the second cause the record and proceedings in the first was conclusive of the fraud and were a conclusive bar to the second action.

Freeman v. *Barnum,* 131 California, 386, was a proceeding by mandamus to compel an auditor to draw a warrant in favor of the petitioner for certain install-

ments of salary alleged to be due him as assistant district attorney of the county, and it was held that a former judgment upon mandamus compelling the auditor to draw such a warrant in favor of the same officer and adjudging as insufficient a defense that the office had been terminated by a rescission of the order authorizing his appointment was an estoppel as to such defense in the latter action.

New Orleans v. *Citizens Bank*, 167 U. S. 371, was a proceeding involving the power of the city of New Orleans to impose certain taxes upon the defendant, and it was held that a former judgment by a court of competent jurisdiction in a suit between the same parties, involving the same facts and circumstances, was a *res judicata* and conclusive upon the parties.

The following is an extract from the opinion rendered by Chief Justice White:

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* cannot apply, whilst admitting in form the principles of the things adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear." (Id., 396.)

Many other cases to the same general principle might be cited, but it is believed those above cited are decisive of this case.

We are constrained to hold that the issue tried and determined in the former *Moser case*, 42 C. Cls. 86, was identical with the one in the case at bar, and is conclu-

sive upon the parties and estops the defendants from again litigating the same question in this suit.

It is contended by the claimant that even if it is admitted the judgment in the former *Moser case* is not conclusive upon the parties in this suit, he is entitled to recover herein under a provision of the act of March 3, 1909, 35 Stat., 753, which is as follows:

"The provisions of the act approved June 29th, 1906, entitled 'An act making appropriations for the naval service for the fiscal year ending June 30, 1907, and for other purposes,' providing for the retirement in the next higher grade of officers of the Navy who served during the Civil War, shall not operate to deprive any officer of the Navy who has been, or may be, retired, since the passage of that act, of the right to increased rank and pay to which, but for the passage of said act, he would have been entitled."

It is argued that it was the evident intention of Congress by the later act to take away all retroactive effect which might otherwise be given to the act of June 29, 1906, 34 Stat. 554, and that any other construction would lead to the absurdity of making the act of 1906 take away the right of any officer who retired before its passage, but relieving from its operation those who have retired since. And numerous authorities from the Supreme Court are cited to the proposition that a statute should not be given a retrospective effect unless the words used are so clear and imperative as to admit of no other construction. This point is not considered or decided, as the first point decided disposes of the case in favor of the claimant.

Judgment for claimant for $5,843.77.